

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Complainants.

vs.

Respondents.

Case 99
No. 23535
MP-892
Decision No. 18408-K

Complainants.

vs.

Respondents.

Case 161
No. 29581
MP-1322
Decision No. 19545-K

Appearances:

No. 18408-K
No. 19545-K

ORDER

The Commission having, on February 4, 1988, issued its Order 1/ denying the Respondent Unions' Motion For Approval of Hudson 2/ Notice To Nonmember Fair Share Payors pending resubmission of the notice in the manner and form required by the Commission; and the Respondent Unions having, on March 10, 1988, filed the Affidavit of AFSCME International Secretary-Treasurer William Lucy and accompanying exhibits; and the Complainants having, on March 24, 1988, submitted argument in response to said Affidavit and objected that the Commission was divested of subject matter jurisdiction as to the matter of the validity of the Respondent Unions' fair-share notice and procedures upon the appeal of the April 24, 1987 decision in these cases to Milwaukee County Circuit Court; and the Respondent Unions having, on March 31, 1988, submitted their corrected Hudson Notice, as well as argument in response to Complainants' position regarding the Commission's jurisdiction to decide the validity of said Notice; and the Respondent Unions having, on April 5, 1988, submitted the Affidavit of District Council 48's Executive Director, John Parr, and accompanying exhibits in support of their request for the Commission's approval of their fair-share notice and procedures; and the Complainants having, on April 7, 1988, filed additional argument in response to the March 31, 1988 submission of the Respondent Unions; and the Commission having considered the Respondent Unions' request and the positions of the parties regarding matters in dispute, and being satisfied that the Respondent Unions' request should be denied at this time;

NOW, THEREFORE, it is

ORDERED

That the Respondent Unions' request for approval of its Hudson Notice To Nonmember Fair Share Payors be, and the same hereby is, denied at this time pending its resubmission as discussed in the accompanying Memorandum.

Given under our hands and seal at the City of
Madison, Wisconsin this 20th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Hempe
A. Henry Hempe, Commissioner

1/ Dec. Nos. 18408-J, 19545-J (WERC, 2/88).

2/ Chicago Teachers Union v. Hudson, 106 S.Ct. 1066 (1986).

MILWAUKEE PUBLIC SCHOOLS
MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING ORDER

BACKGROUND

The Commission's Order issued on February 4, 1988 denied the Respondent Unions' Motion For Approval of Hudson Notice To Nonmember Fair Share Payors. In the accompanying Memorandum we concluded that:

when the Respondent Unions provide the Commission with evidence that they have (1) made the corrections in the proposed notice, and (2) adopted the notice and procedures as the ones to be provided to their fair-share fee payors, the Commission will then approve the notice and procedures. We have indicated that evidence in the form of the corrected notice and accompanying affidavit will be considered sufficient.

The corrections required in that Notice were a clarification in the wording with regard to the right to an advance rebate for latecomers 3/ who elect to "challenge" the Unions' calculations and the amending of the dates in the Notice by which "objections" or "challenges" were to be filed.

The Respondent Unions have resubmitted their Notice, which they allege has been corrected, along with sworn affidavits to indicate that the new procedures and notice have been officially adopted and that this is the notice that will be distributed to all of the fair-share payors in bargaining units represented by Respondent District Council 48 and its affiliated locals.

COMPLAINANTS

The Complainants stated several objections to the Commission's approving the Respondent Unions' Notice. First, regarding the revised "Hudson Procedure" attached to the affidavit of AFSCME International Secretary-Treasurer, William Lucy, Complainants assert that the procedure would violate the Commission's orders of February 4, 1988 and April 24, 1987, 4/ in that: (1) paragraph 3 gives a Council the option of applying the Council's percentage of chargeable expenses to the total expenses of its affiliated locals, and (2) paragraphs 10 and 12 permit the Councils to require that "challenges" or "objections" be made by certified mail. Second, Complainants assert that the Notice is defective in that the financial information it discloses to nonmembers, and upon which the fair-share fee will be based, is not from the Respondent Unions' most recently completed fiscal year. The International's information is based on the year ending December 31, 1986 and District Council 48's is based on the year ending October 31, 1986. The Commission should require any approved notice and procedure to disclose, and the fair-share fee calculation to be based on, financial information from the Unions' most recently completed fiscal years. 5/

The Complainants have also raised the issue of whether the filing of the petition for review in Circuit Court divested the Commission of jurisdiction to approve a revised fair-share notice and procedures. They assert that the filing of a petition for review under Chapter 227, Stats., "implicitly divests the agency

3/ "Latecomers" are those employees who first become subject to a fair-share agreement after the annual dissent period.

4/ Dec. Nos. 18408-G, 19545-G (WERC, 4/87).

5/ The Complainants also contended that the Lucy Affidavit and the bare Notice do not meet the requirement that the Unions provide evidence that this is the notice that will be provided to the fair-share payors in the bargaining units represented by the Respondent Unions. However, that argument was submitted before the Respondent Unions filed the Parr Affidavit which, as we note infra, adequately addresses that concern.

of jurisdiction to decide questions which are presented to the court by the petition for review." The revised notice and procedures submitted by the Respondent Unions for the Commission's approval include provisions that the Commission upheld in its conclusions of law which are being challenged on appeal by Complainants' petition. Hence, the question of the validity of those provisions "necessarily involves issues over which the circuit court - not the Commission - now has jurisdiction." Since objections to subject matter jurisdiction can never be waived and may be raised at any time, the Commission should refrain from any further consideration or action with regard to the proposed notice and procedures until appellate review has been exhausted or the matter remanded to the Commission for further proceedings. In response to the Respondent Unions' contentions, the Complainants assert that the issue of the validity of the Unions' Notice and procedures is a matter "directly concerned with the appeal" and not "unsubstantial and trivial," and, hence, not within the exception to the general rule.

RESPONDENT UNIONS

The Respondent Unions contend that the present Notice it has submitted addresses all of the Commission's criticisms of its prior notice and meets all of the requirements of Hudson. With regard to the issue of the Commission's jurisdiction, the Respondent Unions cite Browne v. Milwaukee Board of School Directors, 69 Wis.2d 169, 175 (1974) as making clear that when there is concurrent jurisdiction, both the agency and the court may entertain jurisdiction to determine the issues before them and that it is not a question of subject matter jurisdiction, but of comity. Hence, it is appropriate for the Commission to determine the adequacy of the Unions' Notice as it would be consistent with the interests of "judicial administration," cited by the court in Browne as a factor to be considered, and required by the interests of the dissenters and the Unions in having an early resolution of the issue and application of the Hudson procedures. In support thereof, the Respondent Unions cite Browne v. Milwaukee Board of School Directors, 83 Wis.2d 316, 340-341 (1978) where the Wisconsin Supreme Court, in response to a motion to stay the proceedings in trial court, noted the concurrent jurisdiction of the Commission and the trial court and held:

The trial court may therefore retain jurisdiction until W.E.R.C. makes its factual determination concerning fair share dues. The plaintiffs' claims may be maintained before W.E.R.C. in the form of the class action that has already been commenced in the circuit court.

When W.E.R.C. has determined all issues before it, both W.E.R.C. and the trial court will be precluded from any further action."

At 341. (Emphasis added) It is contended that the Commission's approval of the Notice will not adversely affect the rights and interests of the parties, rather it will protect and advance those interests as the procedure can then move forward. Conversely, since up until now the parties have looked to the Commission for a determination as to the adequacy of the Unions' Notice, for the Commission to now decline to determine that narrow issue "would be contrary to reasonable and expeditious judicial administration, and the interests of the Unions, the objectors and the challengers." Citing Hunter v. Hunter, 44 Wis.2d 618, 621 (1969), the Respondent Unions contend that this is a case where the exception to the general rule that an appeal divests the trial court of jurisdiction should prevail.

DISCUSSION

Regarding the adequacy of the Respondent Unions' Notice, we find that the newly submitted Notice and the Parr Affidavit, with the accompanying resolution of District Council 48's Executive Board adopting the revised Notice, adequately addresses the problems indicated in our February 4, 1988 Order. However, when the Respondent Unions submitted the notice under consideration in that Order, the Unions conceded that the date by which "objections" and "challenges" would be due would have to be changed. The present Notice retains the November 30, 1987 due date for the filing of "objections" and "challenges," and that will have to be amended so as to give the fair-share fee payors the thirty day period in which to

file their dissent. Further, in their Motion For Approval of Hudson Notice To Nonmember Fair Share Fee Payors filed October 27, 1987, the Respondent Unions stated that:

5. The Notice submitted herewith for approval will be amended prior to mailing to the nonmember fair share payors, by adding the following on page 24 of the "Notice," under "A. Challenges" after the second sentence and following the address:

"Upon receipt of the written challenge AFSCME Council 48 will pay to the challenger an advance rebate equal to the difference between the fees collected from the challenger and that portion of the fees found chargeable by AFSCME Council 48 in accordance with the calculation set forth in this Notice. This advance rebate will be paid from the date of this Notice until June 30, 1988. The advance rebate will be paid on a monthly basis."

Based upon that statement in the Respondent Unions' Motion, the Commission considered that addition to be a part of the notice under review at that time. That addition was not included in the present Notice, presumably due to an oversight by the Respondent Unions. Nevertheless, its absence creates the inference that those who "challenge" the Unions' calculations will not receive an advance rebate. We previously found such an inference as to latecomers who "challenge" to be a defect in the notice, and we reach a similar conclusion here with respect to those who "challenge" during the annual dissent period. All that is needed to correct this defect, however, is to include the missing paragraph cited above. 6/

The Complainants have objected to the approval of the present Notice on the ground that the financial information provided therein, and ostensibly upon which the fair-share fee is based, is not for the Unions' most recently completed fiscal years. We concluded in our April 24, 1987 decision that a union may use its expenses for the prior year to calculate the fair-share fee for the present year. 7/ Noting the Supreme Court's apparent approval of that procedure in Hudson, 8/ we concluded:

The Court appears satisfied that using the union's expenses for the prior year to calculate the fee will be reasonably accurate and will adequately minimize the danger of a dissenting nonmember being charged for the union's nonchargeable activities, while at the same time being workable.

At 40. We agree with Complainants that the financial information to be disclosed to the fair-share fee payors in the Notice, and upon which the present fair-share fee is to be based, must be for the Unions' most recently completed fiscal year. The financial information in the present Notice is for fiscal years ending in 1986. While that information would be adequate as to the next accounting periods ending in 1987, the information is not adequate as to the Respondent Unions' present accounting periods which will end in 1988. Therefore, in order to meet the requirements of Hudson, the Notice must be revised to also include the financial information for the Respondent Unions' most recently completed fiscal years.

Regarding the Complainants' objections regarding AFSCME International's revised "Hudson Procedure," we note that the paragraphs cited by the Complainants do not require the Respondent District Council 48 to apply the

6/ The June 30, 1988 date stated therein would have to be changed due to the passage of time.

7/ At 25 and 40.

8/ Hudson, 106 S.Ct. at 1076, m. 18.

Council's percentage of chargeable expenses to the total expenses of its affiliated locals to determine the latter's percentage of chargeable expenses or to require that "objections" or "challenges" be submitted by certified mail. Rather, the procedure gives the Councils those options. Under the Commission's interpretation of what Hudson requires or permits, those options could not be exercised by the Councils in Wisconsin.

Complainants have also now objected to the Commission ruling on the adequacy of the Respondent Unions' Notice on the basis that the Commission has been divested of jurisdiction to make that determination by virtue of the parties having appealed the Commission's April 24, 1987 decision. We initially note that our decision of April 24, 1987 did not resolve all of the issues in these cases and that the cases remain before the Commission pending determination of those remaining issues in Stage II. 9/ More importantly, however, we view it to be in the interest of all of the parties to make a determination as to the adequacy of the Respondent Unions' Notice. The purpose of our Order, and the purpose of making such a determination, is to bring the Respondent Unions into compliance with the law as expeditiously as is reasonably possible in order to protect the rights of the fair-share fee payors, including Complainants, while at the same time recognizing the Unions' interests in having access to the appropriate fair-share fees. Conversely, further delay in making a determination and correcting the Notice would not appear to serve anyone's interests. For these reasons, the Commission continues to rule on the adequacy of the Respondent Unions' attempts to comply with its Order, and will do so until and unless the Court directs us to do otherwise.

As we stated in our previous decision in these cases, when the Respondent Unions provide the Commission with evidence that they have made the required corrections in their notice and adopted the notice and procedures as the ones to be provided to their fair-share fee payors, the Commission will then approve the notice and procedures. Evidence in the same form submitted in this instance will be considered sufficient.

Dated at Madison, Wisconsin this 20th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Hampe
A. Henry Hampe, Commissioner

9/ The Stage II proceedings will address the issues related to the appropriate amount of the fair-share fees for the Complainants for the years in question.